United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2073

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In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

In the Matter of

LAW RESEARCH SERVICE, INC.

Appellant.

On Appeal from the United States District Court for the Southern District of New York from the Order of Honorable Constance Baker Motley Affirming the Order of Asa S. Herzog Bankruptcy Judge, allowing the Secured Claims of John Herbert Crook

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BRIEF FOR APPELLANT, LAW RESEARCH SERVICE, INC.

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In the Matter of

LAW RESEARCH SERVICE INC., DOCKET #74-2073

Appellant

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BRIEF OF APPELLANT, LAW RESEARCH SERVICE INC.

PRELIMINARY STATEMENT

This brief is submitted by appellant, Law Research Service Inc. On an appeal from an order by Judge Constance Baker Motley* dated June 28, 1974 affirming the order of Bankruptcy Judge Asa S. Herzog** dated November 12, 1973 which overruled the objections of Appellant Law Research Service Inc. ("Law Research") the debtor, to a secured claim filed in these arrangement proceedings by John Herbert Crook ("Crook") in the sum of $25,923.65 with interest of 8 percent to the date of payment.

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*Hereinafter referred to as Motley D. J.
**Hereinafter referred to as Herzog B. J.

Proceedings Below

Crook filed a claim as a secured creditor on July 18, 1972 (2a-1) * based on an assignment dated the 28th day of November 1969, in the sum of $25,923.65 plus interest at 8 percent to the date of payment. The assignment was entered into at the sametime as a settlement agreement dated also the 28th day of November 1969.

Law Research objected to Crook's claim on various grounds. A hearing was held on October 31, 1972 and November 6, 1972. On April 20, 1973, Herzog, B.J. issued an opinion overruling Law Research's objections to Crook's secured claim and denied Law Research's motion that if the claim be allowed Crook be required to discontinue his Texas action as provided in the settlement agreement. Law Research moved for reargument, but again Crook prevailed. Thereafter, Law Research filed a petition to review the order allowing Crook's claim.

On appeal before Motley, D.J. the order was affirmed (8a-1) and the court stated in part:

> "The agreement itself is vague, but not so vague as to be no agreement at all. The parties having failed to make manifest the precise treatment to be accorded the assignment after May 31, 1970, the Bankruptcy Judge rightly attributed the likely interpretation that the assignment was given in consideration for the adjournment as was to be effective sine die."

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* The first number in Brackets refers to number assigned documents in appendix index; the suceeding numbers are to appendix page numbers.

Questions Presented

1. Was the assignment collateral security for collection under the Settlement Agreement and not simply a price for a six-month adjournment?
2. Was the construction below of the settlement agreement as providing that the assignment, being absolute in form, could be collected in full without Crook's releasing the Texas action clearly erroneous?
3. Was the assignment in fact intended as collateral security for payment under the settlement agreement and an assignment of a general intangible within the meaning of UCC §9-106 and should the assignment have been perfected by a proper filing as provided in UCC §9-103?
4. Was the assignment a conveyance absolute made solely in in consideration of a six-month delay of the Texas action and a fraudulent conveyance void as against creditors?

THE FACTS

Law Research was in the business of providing computerized legal research materials to lawyers. It maintained these materials on a computer owned and operated by the Western Union Telegraph Company in New York, and employed the communications facilities of Western Union to make its service available in other states, such as Texas. As a part of its operations, Law Research entered into franchise agreements with individuals -- called "Directors" -- giving each of them the exclusive distributorship for Law Research's products in a defined geographical area. Crook, an attorney, in 1966 purchased; for $15,500 the franchise to sell Law Research's services in the areas surrounding Austin and San Antonio, Texas.

When Law Research got into financial difficulties, Crook sued it and two of its employees* in the Texas State Courts claiming that he had been induced to purchase the franchise by fraudulent misrepresentations. It was as part of the settlement of that law-suit by Crook that Law Research on November 28, 1969 made the assignment that is the basis of Crook's secured claim herein. The assignment was of a part interest in a claim for breach of contract in which Law Research was then suing Western Union

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* Ellias C. Hoppenfeld & Gerald Thatcher

in the New York Supreme Court. The settlement agreement, dated also Nov. 28th, 1969, was drafted by Crook's attorney.

It provided that: (4a-1-3)

> (a) Defendant, Law Research should execute and deliver an assignment of part of its claim against Western Union to the extent of $25,923.65 with interest at the rate of 8 percent from the date of the agreement to the date of actual payment. The amount of $25,923.65 was expressly stated to represent the $15,500 paid by Crook for his franchise and $10,423.65 expended by him in reliance on the franchise (par. 1),* these being the items of his alleged out of pocket damage claimed by him in the Texas lawsuit.
>
> (b) Crook agreed to adjourn the trial of the Texas action from November 29, 1969 to May 31, 1970 -- pending a determination in the Western Union claim, a period of only six months. (par. 2).

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* All emphasis is supplied unless otherwise noted.

(c) The assignment was stated to be made without prejudice to the rights of the parties; and "in the event the assignment was not paid and satisfied in full before May 31, 1970" the trial might proceed and neither party could use the fact of the assignment or agreement as an admission against the other (par. 3).

(d) "Upon full satisfaction and payment of the said assignment before May 31, 1970, "Crook agreed to "discontinue the action" against all three defendants therein and "the parties shall exchange general releases." (par. 4).

The assignment, (4a-6-8), was made on the same day in accordance with the agreement. It assigned $25,923.65 plus interest at 8 percent (until actually paid) out of the much larger claim against Western Union -- ultimately settled for well over a million dollars.

The assignment was not paid on or before May 31, 1970 because Law Research did not receive the proceeds of its claim against Western Union until some time in 1972 -- after the petition herein had been filed under Chapter XI.

Any damage that Crook may have sustained by reason of the failure to make payment on the due date would be more than adequately compensated for by the 8 percent per annum interest

provided for in the assignment.

At the time of the issuances of the assignment in November of 1969 the action was pending in the New York Supreme Court, New York County, index No. 20092, 1967, between Law Research and Western Union.

Crook never filed the assignment pursuant to the provisions of Article 9 of the Uniform Commercial Code which covers the security interests in general intangibles prior to the entry of judgement or any date subsequent to the entry of judgement.

A judgement was entered in the proceedings between Law Research and Western Union on or about the 23rd of June, 1970. This judgement was appealed by Western Union.

Crook was continuously informed of the status of Law Research with reference to its action against Western Union as well as a subsequent filing for a petition of arrangement.

Sometime in October or early November of 1970, Mr. Hoppenfeld on behalf of Law Research and himself offered to pay Crook the full amount due him pursuant to the agreement, including any accrued interest. The offer was rejected because Crook was unwilling to give the releases he was obliged to give under the settlement agreement on the payments being made.

As a result of Crook's refusal, Law Research commenced an action in the Supreme Court, New York County, for specific performance of the settlement agreement, Index No. 17629, 1970. Portions of the affidavits in this matter were read into the record below (3a-36-41) by Crook's attorney.

While the action between Law Research and Western Union was pending on appeal on the 19th day of June, 1971, Law Research filed a petition for an arrangement under Chapter XI in the U.S. District Court.

Immediately after the filing of the petition by Law Research, Crook filed a claim based on the Texas action asserting that the claim was non-dischargeable. The Bankruptcy Court set the matter for trial on the issue of non-dischargeability. Crook has not, to date, moved for a trial to determine the non-dischargeability of that claim.

After the filing of the petition for an arrangement and on or about December 29, 1971, Law Research and Western Union entered into a settlement agreement in which, among other things, a substantial portion of the resulting funds from the settlement was the basis of the plan of arrangement.

That upon the filing of a petition for an arrangement by Law Research in June of 1971, Crook was made aware of the fact that Law Research was before the Bankruptcy Court and that there were proceedings in that Court involving a proposed plan of arrangement involving the creditors of Law Research. Crook was also made aware of the plan of arrangement proposed by Law Research which involved the settlement of the litigation with Western Union (1a-1-8) and the resulting funds would be the basis of the plan of arrangement for the unsecured creditors as well as attorneys and administrative expenses.

The settlement agreement entered into, which became part of the arrangement between Western Union and Law Research on December 29, 1971, provided that the judgement which was on appeal before the Court of Appeals would be vacated and set aside nunc pro tunc.

Although Crook had an opportunity to object to the settlement of the Western Union action and the proposed plan of arrangement, Crook offered no objection to the settlement which included as part of the settlement the vacating of the Western Union judgement nunc pro tunc.

The settlement agreement and the plan of arrangement was approved by the creditors of Law Research and subsequently

approved by the court below and an order to that effect was signed by Herzog, B.J. on the 20th day of June, 1972.

Pursuant to the order of Herzog, B.J. on the 20th day of June 1972, Honorable Harry B. Frank of the Supreme Court of the State of New York, County of New York, entered an order on the 3rd day of August, 1972 vacating and setting aside nunc pro tunc the prior judgement entered in the proceedings before the New York Supreme Court, Index No. 20092, 1967.

In Judge Frank's order, he further provided and directed that the Clerk of the County of New York, mark his records to reflect that the aforesaid judgement had been vacated and set aside as provided for in the stipulation of settlement approved by the Bankruptcy Court on the 20th day of June, 1970, by Herzog, B.J., wherein it stated that the judgement is hereby vacated and set aside and that it shall be of no legal effect for <u>any</u> purpose, as if the judgement had never been made or entered as provided for in Herzog, B.J.'s order approving the settlement agreement and the payment of the funds into the Bankruptcy Court and a majority of the funds eventually disbursed to the unsecured creditors, attorneys and to be used for administrative expenses.

Crook with full knowledge of the fact that a substantial portion of the proceeds of the settlement agreement between Western Union

and Law Research were to be used for the payment of unsecured creditors, made no objection to the settlement agreement and the use of proceeds as aforesaid. As a result of the settlement agreement before the Bankruptcy Court, no funds were received by Law Research but the monies were paid by Western Union directly to the Bankruptcy Court pursuant to the order of Herzog, B.J.

After the approval of the plan of arrangement and the payment of the funds into court, Crook then filed his claim herein asserting the assignment as a second separate claim (2a-1-5). Without setting forth the consideration for the alleged secured claim (2a-1).

POINT I

THE ASSIGNMENT WAS SOLELY COLLATERAL SECURITY FOR THE COLLECTION BY CROOK UNDER THE SETTLEMENT AGREEMENT AND NOT SIMPLY AS A PRICE OF A SIX-MONTH ADJOURNMENT.

Law Research and Crook by his attorney, Richard Aronstein, on Nov. 28, 1969, while the Texas action was pending, agreed to settle the Texas action pending against Law Research and two employees.

A meeting was held in Mr. Aronstein's law office with Mr. Aronstein representing Mr. Crook and Paul Weiner and E. C. Hoppenfeld representing Law Research. Mr. Aronstein presented to Law Research a settlement agreement he had prepared prior to the meeting. (3a-16)

Mr. Weiner objected to the wording of the agreement because he believed that the agreement did not appear to state that the agreement was in full settlement of the claim asserted by Mr. Crook. * (3a-17) Mr. Richard Aronstein, the attorney, stated he believed the agreement stated that the agreement was a full settlement of all claims against the officers, employees, and Law Research Services, Inc., but agreed to Mr. Weiner's changes. (3a-17)

The only evidence adduced below showed that the parties intended a settlement of the Texas action and that the assignment was given toward that end. Mr. Weiner's testimony at (3a-15-18) the hearing which stands uncontradicted, was as follows:

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* Paul Weiner, an officer and director of Law Research, took part in negotiating the settlement agreement on behalf of Law Research.

"I read it (the draft of the agreement) through and I objected to the wording that was originally stated in there, as inasmuch to me as a laymen it did not appear to state that it was a full settlement of the claims asserted by Mr. Crook.

"At that time Mr. Aronstein (Mr. Crook's attorney) stated that he did not think it was necessary, but to satisfy me as a layman he would then change the writing so that I would be satisfied.

"I don't recall the exact wordings that were changed but I know there were some words put in to the effect that this was a settlement of the contractual dispute between Mr. Crook and Law Research Service, and it was to pay Mr. Crook the original franchise fee plus some alleged costs that he had incurred in trying to operate his franchise.

"THE REFEREE: Was that 25 thousand plus at least?

"THE WITNESS: Yes, your Honor.

"THE REFEREE: That was $15,500 that he had paid to Law Research plus some other expenses he had amounting to $10,423.

"THE WITNESS: Yes, your Honor.

"THE REFEREE: And that made up the $25 thousand.

"THE WITNESS: Yes, your Honor.

"THE REFEREE: And he was to get that in satisfaction of his claim against Law Research?

"THE WITNESS: That is correct; in addition to which there was a proceeding, I believe in Travis County, Texas, that was scheduled on for sometime in the very near future, and it was determined that this was to be adjourned -- I don't know if that is the proper word -- adjourned immediately in order for that action not to continue pending this settlement."

Additionally, in the New York Supreme Court proceeding for specific proformance of the settlement agreement Mr. Aronstein stated, under oath, that nowhere in his notes or conservation with Mr. Crook prior to the preparing of the settlement agreement was there ever mentioned that the settlement agreement and assignment was for an adjourrment of the Texas action. Nowhere did that examination indicate that Law Research would pay the full damages ($25,923.65) sought by Crook for a six-month adjournment.

Also, Mr. Aronstein told Mr. Weiner that neither the agreement nor the assigment would be valid if Law Research did not get any money from Western Union and the Texas case had to go to trial.*

Not only did the uncontradicted testimony of Mr. Weiner clearly indicate that the agreement was solely a settlement agreement (3a-17) but Mr. Aronstein, on behalf of Mr. Crook, who tried the case and as part of Crook's case, affirmed that it was a settlement agreement. Mr. Aronstein read into the record on behalf of Mr. Crook (3a-39):

> MR. ARONSTEIN: In the affidavit described as affidavit of Paul Weiner, paragraph 6, in part (page 2 of the Weiner affidavit) as follows:
>
> "Your deponent, Mr. Hoppenfeld, president of LRS went to Mr. Aronstein's office on the 28th day of November, 1969 to finalize the settlement of Mr. Crook's claim. Mr. Aronstein drew a settlement agreement and an assignment which he presented to me and Mr. Hoppenfeld."

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* This does not appear in the record of the Court below, but the reason for its inclusion here will be presented to the Court by the advocate on oral argument.

Mr. Aronstein read into the record on behalf of Mr. Crook (3a-40):

> I am making an offer, your Honor, of an affidavit of Paul Weiner dated October 22nd, 1970 beginning on page 2 thereof, the following language:
>
> "On November 28, 1960 a settlement agreement was entered into between LRS and John Herbert Crook through the firm of Krisel, Lassall, Mintz & Rosen by Richard L. Aronstein, Esq. at 598 Madison Avenue, New York, N.Y. which is annexed hereto as Exhibit 2."
>
> "The settlement agreement provided that upon certain conditions the matter between John Herbert Crook and LRS was settled, and that the action would be discontinued upon payment of the settlement amount of $25,923.65. The amount of $25,923.65 as represented by John Herbert Crook consisted of $15,500 for the franchise fee and $10,425.96 expended by in reliance upon the franchise contract."

"The record and exhibits below are totally void of any facts to substantiate the holding below (8a-1) that the agreement and assignment of the portion of the Western Union claim was for a six-month adjournment except for the recital in the settlement agreement which stated: (4a-1)

> "WHEREAS, the defendants are desirous of adjourning the trial of the said suit until May 31, 1970 and making certain other provisions in regard thereto, it is agreed as follows:"

The court below Motley, D.J. (8a-1) based on this one line in the settlement agreement considered the agreement vague. Even assuming the agreement may be vague, certainly the following points must be taken into consideration.

The settlement agreement was drafted by Crook's attorney. (3a-39) Any possible ambiguity in it must be resolved against Crook whose counsel drafted it. Pfleiderer v. DeVeaux, 3 Misc. 2d 252 (Sup. Ct. 1956). The failure to include an express provision permitting enforcement is fatal to Crook's contention; and even if such a provision had been included, it would have been void. (See pt. IV infra).

Additionally, we should point out:

(a) The "lengthy" adjournment of the Texas suit was merely from November 28, 1969 to May 31, 1970, a period of only six months.

(b) There is absolutely no support in the record for the statement in the First Opinion of Herzog, B.J. (5a-7) that "apparently it was a matter of great consequence to the debtor that the Texas case be adjourned."

Indeed, Herzog, B.J., himself said (6a-11) in his Second Opinion:

> "The debtor complains of my characterizing the adjournment as "lengthy". It also complains that the finding that "apparently it was of great consequence to the debtor that the Texas case be adjourned" has no support in the testimony. Whether a six-month adjournment is termed "lengthy" or whether it is, as the debtor argues, a "few months" is irrelevant. The fact remains that six months is what the debtor required (for what reason was never made clear) and six months is what it received.

By a curious bootstrap argument, having erroneously construed the settlement agreement as giving the right to Crook to continue the Texas suit and in addition to enforce the assignment, Herzog, B.J., said this showed that the adjounment must have been important to the Debtor for why else would it have been willing to pay such a high price merely for an adjournment (6a-11).

Rather than erroneously holding significant the absence of an express provision nullifying the assignment if Crook elected to sue on his original claim, he should have held as a matter of law and fact that what was really significant was the absence of an express provision allowing Crook to both enforce the assignment and to proceed independently with his original claim.

(c) Furthermore, paragraph 2 (4a-2) of the agreement does, in fact, contain a provision implying that the assignment was to be of no effect if Crook proceeded with the trial of his Texas action in the event the assignment had not been paid before May 31, 1970 in that it provided:

> "2. Plaintiff shall adjourn the trial of the action now pending ***, against the defendants to May 31, 1970, at which time if the aforesaid assignment has not been paid in full, the plaintiff may proceed to the trial of the suit against the defendant *** on the merits as if this Agreement had not been executed."

(d) Mr. Aronstein, Crook's counsel herein, never took the stand to contradict Mr. Weiner even even though he cross examined Mr. Weiner, and even though Mr. Weiner had named him as the attorney who negotiated the settlement agreement on the part of Crook and as the attorney who drafted the settlement agreement.

It strains creduality to suppose that a party to a lawsuit would pay pay the full damages sought merely for a six-month adjournment. If the purchase price of an adjournment was all the parties intended, why was the "price" based on Crook's claimed damages?

It is common practice in an agreement settling lawsuits in consideration of future payments, for the agreement to keep the lawsuit open pending actual payment of the agreed settlement amount.

That is all that was done in this case. This is demonstrated by the very terms of the agreement, which provide that if the $25,923.65 was paid by May 31, 1970, Crook "shall" exchange general releases, "while if the $25,923.65 were not paid by May 31, 1970 "the trial may proceed." Concern with a discontinuance and the exchange of general releases is not, we submit, consistent with a bargain simply for an adjournment.

It should be noted that Crook's attorney nowhere in the Record of the testimony, even though he was called as a witness (3a-10-14), ever mentioned or inferred that the settlement agreement was solely for an adjournment of the Texas trial. The first time this theory appears is in the oral argument and Brief submitted by the attorney for Crook. As a result of this legal argument by counsel the court below believed there was vagueness in the settlement agreement.

Therefore, the court below erroneously held that the assignment was completely independent of the settlement agreement by failing to examine the record to determine the true intent of the parties after finding the agreement vague.

POINT II

THE CONSTRUCTION BELOW OF THE SETTLEMENT AGREEMENT AS PROVIDING THAT THE ASSIGNMENT, BEING ABSOLUTE IN FORM, COULD BE COLLECTED IN FULL WITHOUT CROOK'S RELEASING THE TEXAS ACTION WAS CLEARLY ERRONEOUS.

What Motley, D. J., held in essence was that the assignment, being absolute in form, was completely independent of the provisions of the agreement obligating Crook to settle the Texas action and could be enforced and collected by him in full without his settling the Texas action because payment did not take place before May 31, 1970.

This is clearly erroneous. The substance of the agreement is unambiguous: The Texas action was to be settled by payment of $25,923.65; such payment to be made on or before May 31, 1970.

The assignment though absolute in form, was in law simply security for the payment of said sum. In 4 williston, Contracts (3d. ed. 1961), it is said at p. 1029:

"§635. Absolute Written Transfer May be Proved

> By Parol To Be a Mortgage. It is a doctrine, which was early established, that a court of equity will give effect to the real intention of the parties to make a mortgage even though the parties have made an absolute written and sealed transfer of the properly, and this doctrine is uniformly upheld at the present day."

To the same effect: Frensdorf v. Stumpf, 30 N.Y.S. 2d 211 (Sup. Ct. 1941) (assignment absolute in form construed upon parol evidence to create merely a security interest); Macauley v. Smith, 132 N.Y. 524 (1892) (deed absolute construed as mortgage).

Some argument below was made that Law Research did not expressly agree to pay the $25,923.65 as if this, even if true, would somehow change the legal result. Such, however, is not the case.

> In 59 C.J.S., Mortgages §38, p. 74, it is said:
>
> "Where an absolute deed is given as security for a debt, no personal convenant or promise on the part of the grantor to pay the debt is necessary to make it a mortgage."

To the same effect: Macauley v. Smith, supra, 132 N.Y. at 530.

In any event, the interpretation adopted below is at best too literal and in point of fact is contrary to the fair meaning of the settlement agreement on its face and the uncontradicted testimony as well.

In 4 Williston, op. cit supra, §610B, it is said at p. 533:

> "The fact that a contract has been put into express words does not prevent the meaning and legal operation of those words from being affected by their factual environment. Where indispensable to effectuate the intention of the parties, a contract may be implemented beyond its express language, courts have the power to inquire into the real purpose of the agreement; language, though seemingly plain and clear, will not bear a literal interpretation if this leads to an absurd result or thwarts the manifest intention of the parties."

To the same effect: Sacramento Navigation Co. v. Salz, 273 U.S. 326 (1927); Choctau Nation v. United States, 121 F. Supp. 206, 211 (1954); Outlet Embroidery Co. v. Derwent Mills, Ltd., 254 N.Y. 170 (1930), see also pt. III.

We have noted,(supra ptI) that there is in point of fact no express provision in the agreement that Crook may enforce the assignment if he proceeds with his lawsuit, and have shown the gloss put on the agreement below to that effect is contrary to the uncontradicted evidence. It is also contrary to the law as well.

The agreement constituted an executory accord that is "an agreement embodying a promise *** to accept at some future time a stipulated performance in satisfaction or discharge *** of any present claim (or) cause of action *** N.Y. General Obligations Law §15 501 (1).

A creditor who is a party to an executory accord which is not performed may either bring suit for breach of the executory accord or treat it as rescinded and seek enforcement of his original claim. But he may not do both. This is both the statutory and the common law. 15A C.J.S., Compromise & Settlement § 46 (1967); N.Y. General Obligations Law § 15-501(3); Pfleiderer v. DeVeaux, 3 Misc. 2d 252 (Sup. Ct. 1956); Tirado v. Gong Cab Corp. 66 Misc. 2d 215 (N.Y. Civ. Ct. 1971); 2 Pomeroy, Equity Jurisprudence §395 (5th ed. 1941).

It follows that Crook, by seeking herein to enforce the assignment, has made an election to abide by the executory accord and must accordingly be barred from prosecuting the Texas action against the defendants therein as provided in the settlement agreement (4a-3).

This is the learning of Hanke v. Patterson, 205 App. Div. 349 (1st Dep't 1923), where the plaintiff, by suing on promissory notes given in a settlement on which the defendants had defaulted, was held to have elected to waive his right to press his original lawsuit for damages in addition to the amount due under the notes, the Court saying at pp. 349-350;

> "Plaintiff, however, waived any objection on this score and ratified the accord when he sued, and obtained satisfaction when he collected the money on the notes."

This was indeed Herzog, B. J.'s own spontaneous reaction at the December 5, 1972 (3a-61) hearing before he got enmeshed in technicalities. He stated:

> "And I am going to decide one of two things, either that assignment is good, in which case I will stay that action in Texas permanently, and you will get your $25,000, or I am going to hold that the assignment to you is invalid for one reason or another, in which case the dischargeability of the debt will be determined by the District Court."

Time Not of Essence

In any event, time is not of the essence in equity. Crook coming into the Bankruptcy Court, which is a Court of Equity, must do equity. On receiving payment in full with interest of the stipulated amount he must execute general releases to the defendants and discontinue the Texas action.

It needs no elaboration that the Bankruptcy Court is a court of equity, 1 Collier, Bankruptcy § 2.09 (14th ed. 1968); also that in equity time is not of the essence, 4 Pomeroy, Equity Jurisprudence § 1408 (5th ed. 1941); Lese v. Lamprecht, 196 N. Y. 32 (1909); Godfrey v. St. Lawrence, 11 Misc. 2d 942 (Sup. Ct. 1958).

Indeed even courts of law can relieve defendants from failure to make payment on the due date specified in settlement agreements. Goldstein v. Goldsmith, 243 App. Div. 248 (2d Dep't 1935); Mandelbaum v. Silberfield, 186 Misc. 244 (App. Term 1st Dep't 1946).

The fact that the assignment was not paid by May 31, 1970, the date fixed by the Agreement, was not crucial (as Motley, D. J., erroneously held); she should have required Crook to perform the terms of the settlement agreement, by conditioning an allowance of his claim upon the discontinuance of the Texas action and the delivery of general releases to all defendants therein. Her refusal to do so constitutes reversible error.

POINT III

THE ASSIGNMENT WAS COLLATERAL SECURITY FOR THE COLLECTION OF CROOK'S CLAIM AND AN ASSIGNMENT OF A FUTURE INTEREST WHICH REQUIRED PERFECTION AS PROVIDED IN UCC 9-103.

Although neither the assignment nor the settlement agreement used the words "security" or "collateral" it is clear that the essential purpose of the assignment was to provide collateral security for collection of the claim that Crook had against Law Research. The settlement agreement does not provide that the execution and delivery of the assignment shall constitute a satisfaction of the claim, on the contrary, the settlement agreement makes it clear that if recovery on the claim assigned does not result in sufficient funds to pay Crook, the full amount of his settlement, Crook could proceed to enforce his claim (4a -1-5).

In effect the parties agreed that Crook would first look to the assignment as a fund for the payment of his claim, but if the assigned claim of the Western Union action did not materialize, then Crook reserved the right to proceed in the Texas action to enforce his claim. Crook did not surrender the right to proceed in the Texas action.

If, for illustration, Western Union were successful in obtaining a reversal on the decision rendered in favor of the Law Research, the assignment would produce no funds and Crook could have proceeded to trial. Read together the assignment and the settlement agreement clearly show that the assignment was intended as collateral security for the settlement by Crook of the Texas action Crook had against Law Research.

Matter of Law Research Service, Inc. (Martin Lutz Appellate Printers, Inc. appellee, -- F 2d - (2nd Cir. 1974) establishes that the assignment can only be construed as an assignment of future interest. Although the assignment may have become a valid lien when the Western Union judgement was entered, it was clearly a general intangible within the meaning of UCC §9-106 and should have been perfected by a proper filing as provided in UCC §9-103. Crook conceededly did not comply with the filing requirements of the UCC.

Herzog, B.J. in an identical case, the claim of ALTON W. and EVELYN K. HEMBA, decided on June 28, 1974 after the decision in the Law Research-Martin Lutz case, supra, held that assignment to be an unsecured claim. Herzog, B.J. in his decision clearly stated the reasoning for its conclusion as to why the assignment was found to be an unsecured claim on page 13:

"Although neither the assignment nor the settlement agreement uses the word "security" or "collateral," it is clear that the essential purpose of the assignment was to provide collateral security for collection of the judgment. The agreement does not provide that execution and delivery of the assignment shall constitute a satisfaction of the judgment. On the contrary, the agreement makes it clear in paragraph 9 thereof that if recovery on the claim assigned does not result in sufficient funds to pay the Hembas the full amount agreed upon, the Hembas could proceed to enforce their judgment. In effect, the parties agreed that the Hembas would first look to the assigned claim as a fund for the payment of the judgment, but if the assigned claim did not materialize, the Hembas reserved the right to proceed on the judgment to enforce the underlying obligation. The Hembas did not surrender their right to pursue on the judgment. If, for illustration, Western Union were successful on appeal in obtaining a reversal of the decision rendered in favor of the debtor, the assignment would produce no funds and the Hembas could proceed to execute their judgment. Read together, the assignment and the settlement agreement clearly show that the assignment was intended as collateral security for the judgment. The Uniform Commercial Code ("UCC") makes it plain that a security agreement can exist although the instrument on its face appears to be absolute in form.

Official Comment 4 to UCC §9-302 states:

"4. The definition of 'security agreement' (Section 9-105 is 'an agreement which creates or provides for a security interest'. Under that definition the requirement of this Section that the debtor sign a security agreement is not intended to reject, and does not reject, the deeply rooted doctrine that a bill of sale although absolute in form may be shown to have been in fact given as security. Under this Article as under prior law debtor may show by parol evidence that

> a transfer purporting to be absolute was in fact for security and may then, on payment of the debt, assert his fundamental right to return of the collateral and execution of an acknowledgement of satisfaction."
>
> Moreover, section 9-102 (1) provides in relevant part that". . ., this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this State (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property . . ." (emphasis added). Further, the definition of the term "agreement" in Section 1-201(3) is "the bargain of the parties in fact as found in their language or by implication from other circumstances. . . ."
> I am satisfied, and I find, that the assignment was in fact intended as collateral security for the judgment to be entered pursuant to the agreement. The assignment of a portion of the debtor's claim against Western Union was an assignment of a general intangible within the meaning of UCC §9-106 and should have been perfected by a proper filing as provided in UCC §9-103. The Hembas concededly did not comply with the filing requirements of the UCC.

UCC §9-301(b) renders the unperfected security of Crook subordinate to the claims of intervening creditors without notice, and by definition in subsection (3) of §9-301 a trustee in bankruptcy is specifically included within the term "lien creditor", the debtor in possession has all the powers of an ordinary trustee. Therefore, the lien of Crook is subordinate to that of the debtor in possession and cannot assert a claim to the funds set apart for secured creditors. Herzog, B. J. clearly stated the applicable law in the decision of June 28, 1974 in the claim of ALTON W. and EVELYN K. HEMBA at page 16 when the Court stated:

> "UCC §9-301(b) renders an unperfected security interest subordinate to the claims of intervening creditors without notice, and by definition in subsection (3) of S9-301 a trustee in bankruptcy is specifically included within the term "lien creditor." A debtor in possession "has all the powers of an ordinary trustee." Central Hanover Bank & Trust Co. v. Pres. and Directors of Man. Co., 105 F 2d 130, 131, (2d Cir. 1939). He is a court officer "analagous to a receiver or trustee." In re Wil-low Cafeterias, Inc., 111 F. 2d 83 (2d Cir. 1940)."

Herzog, B.J. properly held by virtue of section 70 of the Bankruptcy Act, that the creditor cannot assert a claim to the funds set aside for secured creditors when he stated on page 16:

> "By virtue of §70c of the Bankruptcy Act., the trustee in bankruptcy, and therefore, a debtor in possession, is accorded an "ideal" status -- he is the "perfect" creditor who has complied with all requirements necessary under applicable law for a lien by legal or equitable process. Accordingly, the lien of the Hembas is subordinate to that of the debtor in possession and they cannot assert a claim to the fund set apart for secured creditors."

Therefore, the claim of Crook should be classified as an unsecured claim.

POINT IV

IF THE ASSIGNMENT COULD BE CONSTRUED AS A CONVEYANCE ABSOLUTE MADE SOLELY IN CONSIDERATION OF A SIX-MONTH DELAY OF THE TEXAS ACTION, IT WOULD BE A FRAUDULENT CONVEYANCE VOID AS AGAINST CREDITORS.

An assignment made without fair consideration when the assignor is insolvent or will become insolvent thereby is fraudulent as to creditors. N.Y. Debtor & Creditor Law, §§ 271, 272, and 273. The assignment would only be valid against creditors if it were made for "fair consideration." "Fair consideration" means much more than the technical consideration sufficient to sustain a contract. 24 N.Y. Jur., Fraudulent Conveyances §24 at p. 426 (1962). Section 272 of the Debtor and Creditor Law expressly requires that, to be fair, the consideration must not be "disproportionately small as compared with the value of the property *** obtained."

Here, Motley, D.J., held that all that Crook gave for the assignment was a six-month adjournment of his case and that he retained in addition his full claim without any credit to be given for the proceeds of the assignment. This is clearly insufficient in law. Zellerbach Paper Co. v. Valley Nat'l Bank, 13 Ariz. App. 431, 477 p. 2d 550 (1970) (under uniform statute identical to New York's, two-month extension of $11,000 debt not fair consideration for insolvent debtor's guaranty of $25,000 obligation); Hahn v. Wood, Stubbs Co., 174 Ky. 138 (1917) (agreement not to prosecute suit not sufficient consideration

for an insolvent debtor's mortgage); cf. Shultz v. Itemco, Inc., 233 N.Y.S. 2d 655 (Sup. Ct. 1962) ("overly generous assignment" to attorney held not "fair consideration").

To construe the agreement and assignment as other than a settlement of the Texas action would be inconsistent with the accepted rule of construction that agreements should be construed so as to avoid unlawful results. 3 Corbin, Contracts § 546 at 170-71 (1960); Restatement 2d, Contracts § 236 (a).

Conclusion

For the foregoing reasons, the order allowing Crook's claim as a secured claim, and overruling Law Research's objections thereto, should be reversed and Crook permanently enjoined from prosecuting the Texas action against all the defendants therein.

Respectfully submitted,

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Attorneys for Appellant

Of counsel:

Ellias C. Hoppenfeld

AFFIDAVIT OF SERVICE BY MAIL

State of New York
County of New York } ss

Linda Kardian being duly sworn, deposes and says, I am not a party to this action and am over 18 years of age. On the 21st day of October, 1974, I served two copies of the within Appellant Brief upon the following attorneys representing the following parties at their following respective addresses designated by said attorneys, by depositing a true copy of the same enclosed in a postpaid properly addressed envelope in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Attorneys	Address	Party
Richard L. Aronstein	275 Madison Avenue New York, New York	John Herbert Crook

Linda Kardian

Sworn to before me

this 21st day of October, 1974

Notary Public

ELLIAS C. HOPPENFELD
Notary Public, State of New York
No. 31-5959725
Qualified in New York County
Cert. filed with N. Y. Co. Clks. Off.
Commission Expires March 30, 1976